

STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company	)	
	)	Docket No. 02-0864
Filing to increase Unbundled Loop	)	
and Nonrecurring Rates	)	

STAFF OF THE ILLINOIS COMMERCE COMMISSION'S  
RESPONSE TO JOINT CLECs' MOTION TO STRIKE TESTIMONY

NOW COMES the Staff of the Illinois Commerce Commission ("Staff"), through its undersigned counsel, pursuant to 83 Ill. Admin. Code 200.190, and in response to the Revised Joint CLECs' Motion to Strike Testimony, states as follows:

1. On March 12, 2004, AT&T Communications of Illinois, Inc. ("AT&T"), McLeodUSA Telecommunications Services, Inc., RCN Telecom Services of Illinois, LLC, TDS Metrocom, LLC and WorldCom, Inc. d/b/a MCI ("MCI") (hereafter referred to as "Joint CLECs") filed a motion entitled Revised Joint CLECs' Motion To Strike Various Portions Of The Testimonies Of SBC Witnesses Mr. David Barch, Dr. Kent Currie, Ms. Vivian Gomez-McKeon, Mr. James Smallwood, Mr. Lawrence Vanston and Mr. Randall White, IBEW Witness Mr. Kastner and Staff Witness Dr. Qin Liu (the "Motion"). With respect to Staff witness Dr. Qin Liu, Joint CLECs Motion seeks to strike a portion of Dr. Liu's surrebuttal testimony; specifically, page 31, line 660 through page 40 line 867. Motion at 12. For the reasons set forth in this response, the Joint CLECs' Motion is bereft of any merit whatever, and should be denied.

2. The Motion begins with what is to be hoped is the last installment of the Joint CLECs' continuing complaints regarding the schedule the Commission adopted in this proceeding. Motion at 1-5. According to the Joint CLECs, they have been gravely prejudiced by this schedule, and the dearth of time that they have had to prepare their

cases. Id. The CLECs have been consistent in this view, making essentially the same assertions in their Initial Brief on Issues on Reopening and Motion to Revise Reopening Order and Schedule; their Reply Brief on Issues on Reopening; AT&T's Supplemental Brief Regarding Additional Substantive Changes Made by SBC Illinois in its Rebuttal Testimony; AT&T's Second Supplemental Brief Regarding Additional Substantive Changes Made By SBC Illinois in its Rebuttal Testimony; the Intervening CLECs' Reply To "SBC Illinois' Response To AT&T's Supplemental Brief Regarding Additional Substantive Changes Made By SBC Illinois in its Rebuttal Testimony" and Specific Schedule Proposal; and the Intervening CLECs' Emergency Motion for Reconsideration and Request for Ruling. To the extent that Joint CLECs' Motion to strike portions of Dr. Liu's testimony is based on Joint CLECs' ongoing complaints regarding the schedule (and Joint CLECs' Motion appears to be based in large part on such complaints), their Motion to strike is neither well taken nor meritorious.

3. First, in denying the Joint CLECs' previous requests to modify the schedule, the Commission has already rejected the Joint CLECs' general claim that the schedule for this docket has or will result in a denial of due process. While the schedule adopted may have been less convenient or more expedited than preferred by the Joint CLECs (and Staff too for that matter), the schedule adopted has provided all parties multiple opportunities to respond to each other and does not even approach setting time lines at intervals amounting to a denial of due process. Simply put, while parties may not consider the schedule to be optimal, the time allotted to the parties to prepare this case has not been unreasonably short and due process has not been denied. Further, given that all parties, SBC Illinois and Staff included, have operated under the same

time constraints, no party can claim that they have been prejudiced to the benefit of any other party. Second, whatever complaints Joint CLECs may have about the schedule, it is certainly improper to suggest that testimony is somehow rendered improper because of those complaints. While Joint CLECs may be unhappy with the schedule, that is no basis in and of itself to strike Staff's or any other party's testimony.

4. The Joint CLECs' attack Dr. Liu's surrebuttal testimony based on their characterization of Dr. Liu's January 20, 2004, rebuttal testimony as "a 180 degree turnaround" from prior Staff testimony regarding fill factors. Motion at 12. They further complain that Dr. Liu failed to present specific fill factors in her January 20, 2004 rebuttal testimony. Id. Whatever point Joint CLECs are attempting to make by these characterizations of Dr. Liu's *rebuttal testimony*, it is certainly not one relevant to their Motion to strike portions of Dr. Liu's *surrebuttal testimony*: These statements are totally irrelevant and amount to little more than gratuitous complaints. Nevertheless, Staff strongly disagrees with Joint CLECs' characterization of Dr. Liu's rebuttal testimony as any kind of "turnaround", and such subjective characterizations are inappropriate and inflammatory, and do nothing to aid the Commission in its consideration of their Motion. Indeed, such comments seem to underscore that the real issue here is that Joint CLECs do not like Dr. Liu's recommendations – but that is hardly a reason to strike any portion of her testimony.

5. Joint CLECs final asserted basis for striking a portion of Dr. Liu's surrebuttal testimony is that such testimony is somehow improper in light of Staff's responses to certain discovery requests. Motion at 13-17. As will be shown below, Joint CLECs' arguments in this regard are lacking in merit, are based on a distortion of

Staff's data request responses, ignore Staff's clearly stated objections to Joint CLECs' data requests, and ignore that Dr. Liu's testimony is in response to Joint CLECs' witnesses' attack of Dr. Liu's position. As a preliminary matter, however, Staff also objects to Joint CLECs' arguments in this regard as an improper method of resolving what – at best – is a discovery dispute. The Commission's Rules of Practice clearly require a party to attempt to resolve discovery disputes through informal consultation.

83. Ill. Adm. Code § 200.350. Although AT&T issued additional data requests following Staff's objections to its initial data requests, it never attempted to resolve Staff's objections to all such requests nor filed any sort of motion to compel. Unhappy that their vague and confusing data requests did not elicit the information they apparently desired, Joint CLECs now seek to strike testimony offered in response to specific assertions contained in their witnesses' testimony (but not in their data requests). As such, the Motion essentially presents a discovery dispute (rather than a testimonial issue) for which Joint CLECs have failed to follow the proper procedure.

6. Joint CLECs' discovery based arguments fare no better on the merits as objections to testimony. Joint CLECs explain how, in an apparent attempt to head off surrebuttal at the pass, they issued a number of data request to Staff witness Dr. Liu.<sup>1</sup> Motion at 13. Joint CLECs charitably characterize their data requests as an attempt "to learn more about [Dr. Liu's] new fill factor concept and upon what information she relied in formulating it." *Id.* In reality, most if not all of the data requests at issue under the

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<sup>1</sup> Joint CLECs can not have it both ways. In responding orally to SBC's opposition to the Motion to strike portions of the testimony of SBC witnesses Messrs. Smallwood and White, counsel for AT&T argued that the fact that SBC Illinois produced information in response to discovery requests was essentially irrelevant because testimony is to respond to testimony, not discovery. Tr. at \_\_\_\_ (Transcript Not Yet Available). With respect to Staff witness Dr. Liu, it is the Joint CLECs that take a 180 degree turn, arguing that Dr. Liu's testimony should be stricken because they essentially claim they should have been able to determine Dr. Liu's surrebuttal testimony in advance through discovery.

Motion were replete with vague, confusing and indecipherable questions, which were further objectionable for seeking legal opinions or containing mischaracterizations. If anything, these data requests were an attempt to develop potential cross on matters not discussed by Dr. Liu, rather than seek information relied upon by Dr. Liu.

7. For example, AT&T Data Request MS-147 provided as follows:

Referring to pages 36 – 37 of Dr. Liu’s rebuttal testimony, please state whether Dr. Liu agrees or disagrees that the FCC’s further clarification on appropriate demand assumptions for cable fill factors in its *USF Inputs Order* (10<sup>th</sup> Report and Order, FCC 99-304, released November 2, 1999) is applicable in a TELRIC proceeding. If Dr. Liu disagrees, please explain in detail why she disagrees.

Data Request MS-147 vaguely refers to “the FCC’s further clarification on appropriate demand assumptions for cable fill factors in its *USF Inputs Order* . . . .” The only thing Staff – or anyone -- could discern from this request is that it relates to some aspect of “cable fill factors” in the *USF Inputs Order*. It would be hard to draft a more vague question about the *USF Inputs Order*. What is the meaning of “further clarification” and “appropriate demand assumptions” in this data request? Even if the data request had defined what it meant by these vague terms, it cryptically asks whether whatever aspect of the *USF Inputs Order* it was referring to “is applicable in a TELRIC proceeding.” In this context the word “applicable” is anything but specific. If this was intended as a request for a legal opinion, one might have some hint as to the meaning of the question if the underlying legal rule had been specified. However, it would then be an improper request for a legal opinion. When viewed as a non-legal question – which is the only legitimate manner in which it could be viewed – use of the term “applicable” rendered the request hopelessly vague. Finally, Dr. Liu’s testimony at pages 36 to 37 makes no reference to the *USF Inputs Order*. Rather, it is the Joint CLECs and their witnesses, as

indicated by Joint CLECs' February 20, 2004, rebuttal testimony, who appear to contend that the USF Inputs Order somehow applies to this case.<sup>2</sup>

8. Moreover, Staff disagrees with Joint CLECs' apparent legal position given that the FCC itself considers the *USF Inputs Order* to be of little utility to state Commissions in establishing TELRIC costs. As the FCC noted in the *USF Inputs Order*:

The federal cost model was developed for the purpose of determining federal universal service support and **it may not be appropriate to use nationwide values for other purposes, such as determining prices for unbundled network elements.**

USF Inputs Order, ¶30 (emphasis added). The FCC has reiterated this position as recently as September 2003 in its *TELRIC NPRM*, when it stated that:

In developing the model and inputs necessary to calculate universal service funding [in the *Universal Service Proceeding*], the Commission did not intend to provide any systematic guidance to states in the area of TELRIC rate-setting. Indeed, the Commission emphasized at the time that its decisions on particular inputs were made solely for the purpose of calculating universal service support and may not be appropriate for the calculation of UNE prices. **For these reasons, we continue to discourage states from using the nationwide inputs for the purpose of developing UNE prices.**

TELRIC NPRM, ¶46 (emphasis added).

9. Joint CLECs quote Staff's Response to MS-147, but do not quote Staff's objection. See Motion at 14. Staff's complete objection and response to MS-147 was as follows:

Staff objects to AT&T Data Request MS-147 because it calls for Staff to provide a legal opinion. Staff further objects to AT&T Data Request MS-147 because it is vague, ambiguous and unduly burdensome. AT&T Data Request MS-147 generally refers to what it characterizes as the FCC's "clarification on appropriate demand assumptions for cable fill factors" in the *USF Inputs Order*. The *USF Inputs Order* is over 200 pages long and contains many different statements regarding cable fill factors. Thus, the

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<sup>2</sup> AT&T Data Request MS-148 to MS-150 suffered from similar deficiencies. In the interest of time, Staff will not unnecessarily repeat this analysis with respect to the other data requests.

general reference to “appropriate demand assumptions” is vague and ambiguous, and the question is unduly burdensome to the extent that it seeks a response regarding every comment on cable fills in the *USF Inputs Order*. Subject to and without waiving these objections, Staff responds as follows:

Dr. Liu cannot respond to AT&T Data Request MS-147 because – to the extent it calls for a non-legal opinion -- the question presented is vague and confusing. Additionally, Staff witness Dr. Liu does not have sufficient familiarity with the FCC cost model utilized in the FCC proceeding that resulted in the *USF Inputs Order* to determine whether or how the “demand assumptions for cable fill factors” in the *USF Inputs Order* are relevant to the SBC LoopCAT cost model being utilized in this proceeding.

Thus, notwithstanding Staff’s legitimate objections, Staff made an attempt to respond to AT&T’s data request to the extent that it could. Given Staff’s objections, however, it was clear that Staff’s response was not a full response due to the objections concerning the vagueness of the question. Nevertheless, Joint CLECs made no effort to resolve the objectionable nature of their request.

10. As noted above, Staff’s response -- made subject to its objections -- indicated that “Dr. Liu does not have sufficient familiarity with the **FCC cost model** utilized in the FCC proceeding that resulted in the *USF Inputs Order* to determine whether or how the ‘demand assumptions for cable fill factors’ in the *USF Inputs Order* are relevant to the SBC LoopCAT cost model being utilized in this proceeding.” Staff Response to MS-147 (emphasis added). Contrary to Joint CLECs’ claim, Staff’s response did not indicate that Dr. Liu was not familiar with the FCC orders at issue. Motion at 15, 16, 17. Thus, there is no truth to Joint CLECs’ assertions that Staff’s data request responses were contradicted by Dr. Liu’s surrebuttal testimony. Staff’s data request responses clearly indicated that Dr. Liu was not familiar “with the model”, not that she was not familiar “with the order.” Indeed, Joint CLECs’ conveniently omit from their Motion that Staff’s responses to data requests MS-115 to MS-118 specifically

confirmed that Dr. Liu was aware of both the *USF Inputs Order* and the *Virginia Arbitration Rate Order*:

MS-115 Referring to pages 36 – 37 of Dr. Liu’s rebuttal testimony, please confirm or deny whether Dr. Liu is aware of the FCC’s further clarification on appropriate demand assumptions for cable fill factors in its *USF Inputs Order* (10<sup>th</sup> Report and Order, FCC 99-304, released November 2, 1999) which was released approximately three years after the FCC’s *Local Competition Order* relied upon by Dr. Liu for her demand criteria.

Staff Response to MS-115

Staff objects to AT&T Data Request MS-115 to the extent that it mischaracterizes the FCC’s rulings in the *USF Inputs Order*, and to the extent that it calls for Staff to provide a legal opinion or a legal conclusion. Subject to and without waiving these objections, Staff responds as follows:

Staff witness Dr. Liu is aware of the FCC’s *USF Inputs Order*.

MS-116: Referring to pages 36 – 37 of Dr. Liu’s rebuttal testimony, please confirm or deny whether Dr. Liu is aware that the FCC affirmed its *USF Inputs Order* demand assumptions for fill factor determination in DA 03-2738 (*Virginia Arbitration Order*), ¶¶ 247 and 254, released August 29, 2003.

Staff Response to MS-116

Staff objects to AT&T Data Request MS-116 to the extent that it mischaracterizes the FCC’s rulings in the *USF Inputs Order* and the *Virginia Arbitration Order*, and to the extent that it calls for Staff to provide a legal opinion or a legal conclusion. Subject to and without waiving these objections, Staff responds as follows:

Staff witness Dr. Liu is aware of the FCC’s *USF Inputs Order* and the *Virginia Arbitration Order*.

MS-117: Referring to pages 36 – 37 of Dr. Liu’s rebuttal testimony, please state whether Dr. Liu is aware that the FCC rejected projections of total demand based on the use of ultimate demand because ultimate demand is considered too speculative (*USF Inputs Order*, ¶¶ 199-202). If the answer is



yes, please state whether Dr. Liu's definition of "accumulated future demand" is based on the concept of ultimate demand.

#### Staff Response to MS-117

Staff objects to AT&T Data Request MS-117 to the extent that it mischaracterizes the FCC's ruling in the *USF Inputs Order* and to the extent that it calls for Staff to provide a legal opinion or a legal conclusion. Subject to and without waiving these objections, Staff responds as follows:

Staff witness Dr. Liu is aware of the FCC's *USF Inputs Order*. Dr. Liu's definition of "accumulated future demand" incorporates the concept of projected future demand (see Staff Response to MS 112).

MS-118: Referring to pages 36 – 37 of Dr. Liu's rebuttal testimony, please state whether Dr. Liu is aware that the FCC requires the use of current demand, which includes a reasonable amount of excess capacity to accommodate short-term growth (*USF Inputs Order*, Fn 761). If the answer to this request is yes, please state whether Dr. Liu's definition of "accumulated future demand" is based on the concept of current demand as defined by the FCC in the *USF Inputs Order*.

#### Staff Response to MS-118

Staff objects to AT&T Data Request MS-118 to the extent that it mischaracterizes the FCC's ruling in the *USF Inputs Order* and to the extent that it calls for Staff to provide a legal opinion or a legal conclusion. Subject to and without waiving these objections, Staff responds as follows:

Staff witness Dr. Liu is aware of the FCC's *USF Inputs Order*. Dr. Liu's definition of "accumulated future demand" incorporates the concept of projected future demand (see Staff Response to MS 112).

Joint CLECs, notwithstanding having received these responses indicating Dr. Liu was aware of the FCC orders, proceed to distort the facts in their Motion, wrongfully asserting that Staff indicated that Dr. Liu was not familiar with the FCC orders. Motion at 15, 16, 17. Staff's responses to the subsequent data requests (MS-147 to MS-150) indicated that Dr. Liu was not personally familiar with the FCC models. Dr. Liu's

surrebuttal testimony does not indicate or claim personal familiarity with the FCC cost models, but instead refers to language in the FCC Orders. As such, Dr. Liu's testimony is consistent with the data request responses.

11. Joint CLECs are correct that Dr. Liu discusses the *USF Inputs Order* and the *Virginia Arbitration Order* in her surrebuttal testimony circulated on March 5, 2004. Motion at 16. However, contrary to Joint CLECs' assertions, as explained above, Staff did not assert that Dr. Liu "was not familiar with such Orders". *Id.* Dr. Liu's discussion of the *USF Inputs Order* and the *Virginia Arbitration Order* was proper surrebuttal given that Joint CLECs' witnesses Messrs. Starkey and Fisher made arguments concerning these Orders in their February 20, 2004, testimony. Joint CLECs' attempt to cast doubt on the propriety of Dr. Liu's surrebuttal testimony outside the discovery issue (although not making that specific claim), making the following statement:

In a remarkable and astounding act by a Commission Staff witness, Dr. Liu's March 5 surrebuttal testimony consists almost entirely of defending SBC witnesses against criticisms by CLEC witnesses Starkey and Fischer.

Motion at 16, footnote 8. This statement by Joint CLECs is disingenuous at best. First, Messrs. Starkey and Fisher's surrebuttal testimony regarding fills was directed at Staff witness Dr. Liu as well as SBC Illinois witnesses Messrs. Palmer, Smallwood and White. See AT&T/Joint CLEC Ex. 1.2P at 72. Second, one of the "two primary points" that Messrs. Starkey and Fisher make in their surrebuttal testimony is that "fill factors based upon actual usage of SBC's network are not forward-looking and, therefore, are not TECRIC compliant." *Id.* at 72-73. Although Staff's proposed fill factors are not the same as or equal to the actual current usage of SBC's network, as are SBC's proposed fill factors, Staff's proposed fill factors are "based upon" such actual usage, being

derived from adjustments to SBC's actual fills to arrive at fills that Staff considers representative of an efficient, forward-looking network. Thus, even those portions of Messrs. Starkey and Fisher's surrebuttal testimony ostensibly directed to SBC's witnesses is in fact an attack of Staff's position as well. That Joint CLECs routed their attack of Staff's position through SBC Illinois witnesses does not and cannot insulate them from any response by Staff, nor does it make Staff's response in any way improper.

12. In another distortion, Joint CLECs improperly suggest that Dr. Liu's comments about FCC statements in its TELRIC rulemaking orders (i.e., the Local Competition Order and the recent TELRIC NPRM) were statements about or concerning the *USF Inputs Order* and the *Virginia Arbitration Order*. See Motion at 16. Specifically, Joint CLECs' state as follows:

In fact, Dr. Liu opined in her February 20, 2004 rebuttal testimony (page 11, lines 215-220) that the FCC had "... not provided any instructions on how to develop fill factors beyond the general guideline that the fill factors should reflect the 'projection of the actual total usage,' and the TELRIC methodology 'is designed to calculate the total cost of building a new efficient network.'"

If Dr. Liu believed that the FCC's *USF Inputs Order* and its *Virginia Arbitration Order* did not provide further instructions or guidelines, she should have stated her opinion in the January 20, 2004 rebuttal round (in rebuttal to the testimony the CLECs filed in May prior to abatement) or in the February 20, 2004 rebuttal round.

*Id.* Although not signaling the omission of citations from the quote of Dr. Liu's testimony, Joint CLECs in fact omit Dr. Liu's footnote citations to "the Local Competition Order, ¶ 682" and the "TELRIC NPRM, ¶ 18." See ICC Staff Ex. 25 at 11, footnotes 27, 28. This appears to Staff to be a not too subtle attempt to improperly suggest that Dr. Liu had somehow made comments regarding the *USF Inputs Order* and the *Virginia*

*Arbitration Order* so as to further their wrongful portrayal of Staff's testimony and data request responses. Joint CLECs know full well that potential issues concerning the *USF Inputs Order* and the *Virginia Arbitration Order* are issues their witnesses raise, not Staff; and if Joint CLECs wanted to obtain Dr. Liu's opinions regarding their witnesses' assertions concerning those Orders, they should have asked straight forward and clear questions seeking such opinions – which they did not.

13. Finally, there is no rule requiring Staff or any party to disclose information not requested. If information is available, parties are required to disclose that information when requested through discovery. The vague, confusing and indecipherable questions presented in Joint CLECs' data requests simply did not request the information that Joint CLECs now complain they did not receive. Staff did not have a crystal ball to determine what CLECs now claim they intended to request, but did not. Indeed, there should be no doubt that Staff witness Dr. Liu was generally unfamiliar with Messrs. Starkey and Fisher's position on the *USF Inputs Order* and the *Virginia Arbitration Order* at the time of Staff's Data Request Response (February 27, 2004), their testimony having only been circulated on Friday, February 20, 2004, and Staff witness Liu having been involved in hearings in Docket 03-0596 (*TRO* Loops/Transport Proceeding) from Monday, February 23, 2004, through Friday, February 27, 2004. Clearly, Dr. Liu worked very diligently in the week after hearings ended in Docket 03-0596 to prepare surrebuttal testimony in this docket, but Staff views such diligence as conduct to be commended rather than conduct to be condemned.

WHEREFORE, Staff respectfully requests that Joint CLECs' Motion to strike portions of the surrebuttal testimony of Staff witness Dr. Liu be denied

Respectfully submitted,

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